

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA OVERBEY

Claimant

VS.

IBP, INC.

Self-Insured Respondent

Docket No. **220,924**

ORDER

The claimant appeals the Award of Administrative Law Judge Brad E. Avery dated September 11, 2000. The Board heard oral argument on February 20, 2001. Workers Compensation Board Member Gary Korte recused himself from these proceedings. Stacy Parkinson was appointed Workers Compensation Board Member Pro Tem to replace Mr. Korte.

APPEARANCES

Claimant appeared by her attorney, Roger D. Fincher. The self-insured respondent appeared by its attorney, Bradley D. Thornton. There were no other appearances.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded the claimant an 8 percent permanent partial general disability based upon functional impairment.

On review, the claimant contends the Administrative Law Judge erred by finding the claimant could earn 90 percent or more of her average gross weekly wage that she was earning at the time of her injury and limiting her compensation to a functional impairment.

The claimant contends that she is entitled to a work disability based upon diminished wage and task loss.

Conversely, the respondent contends that the Administrative Law Judge's award should be affirmed in all respects.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The parties stipulated that the claimant sustained injury due to a series of accidents through January 10, 1997, when she left her employment with the respondent.

The claimant stated that when she began to develop pain in her neck, shoulders and wrists that she was seen by the company physician and treated conservatively with medication and physical therapy. Thereafter, the claimant was referred to Dr. Glenn and he imposed job restrictions. Respondent contends that claimant thereafter was placed in various jobs that did not exceed her restrictions. The claimant disagrees and states that she was still placed in jobs that required her to lift overhead and lift more than 30 pounds which exceeded her restrictions.

The claimant was off work for awhile due to pregnancy and delivery of a child. When she returned to work she continued to have problems and was seen by Dr. Glenn who subsequently referred her for a second opinion with Dr. Melhorn on November 8, 1996.

The claimant testified that because her employer required her to perform work that exceeded her restrictions she continued to have pain. The claimant ultimately quit her job with respondent due to the pain and her belief that was the only way her shoulders would get better.

After the claimant terminated her employment with the respondent, she began working for the jail in Emporia. The claimant worked a 40-hour week and was paid \$9.70 an hour. She voluntarily left that job because of a pregnancy. When claimant left she was told that following the birth of her child she could return to her job at the jail.

Following the birth of the child, the claimant began working at her husband's place of business. Her job duties consisted of performing secretarial functions as well as teaching Tae Kwon Do classes. The claimant worked approximately 30-hours a week but was not paid a salary.

The dispositive issue is whether the claimant has met her burden of proof to establish entitlement to a work disability.

K.S.A. 1996 Supp. 44-510e(a) provides in pertinent part:

“An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.”

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a). *Oliver v. Boeing Company-Wichita*, 26 Kan. App.2d 74, 977 P.2d 288, rev. denied ___ Kan. ___ (1999).

If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages. *Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997). In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment. *Parsons v. Seaboard Farms, Inc.* 27 Kan. App.2d 843, 9 P.3d 591 (2000).

It is the claimant's uncontradicted testimony that when she left her job at the jail due to a pregnancy the employer advised her that after the birth of her baby she could return to the job. Instead of returning to the employment that would have paid a wage more than 90 percent of her pre-injury wage, the claimant made the decision to go to work with her husband. It was the claimant's voluntary choice to become under-employed. Accordingly, the Board finds she has failed to make a good faith effort to find appropriate employment post-injury. Therefore, her actual wage will not be used to determine wage loss. Instead, a wage will be imputed based upon her capacity to earn wages. Herein, the claimant had clearly demonstrated that she could earn a wage with another employer which was in an amount more than 90 percent of her pre-injury wage. As a result, her compensation is limited to her functional impairment in accordance with the statute.

The sole testimony regarding the claimant's functional impairment was provided by Dr. Bieri. Dr. Bieri opined that as a result of the claimant's injuries to her thoracic spine as well as her mild entrapment neuropathy in the right upper extremity the claimant has an 8 percent functional impairment to the body as a whole. The Administrative Law Judge's finding that the claimant is entitled to an 8 percent permanent partial whole body functional impairment is affirmed in all respects.

AWARD

WHEREFORE, it is the finding of the Workers Compensation Board that the award of Administrative Law Judge Brad E. Avery dated September 11, 2000, should be affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Copies to:

Roger Fincher, Attorney for Claimant
Bradley Thornton, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director